

IN THE COURT OF APPEALS OF IOWA

No. 7-326 / 06-1160

Filed June 27, 2007

IN RE THE MARRIAGE OF PAUL HULS AND MELISSA HULS

**Upon the Petition of
PAUL HULS,**

Petitioner-Appellee,

**And Concerning
MELISSA HULS,**

Respondent-Appellant.

Appeal from the Iowa District Court for Plymouth County, Edward A. Jacobson, Judge.

Melissa Huls appeals from the district court order denying her motion to modify visitation and finding her in contempt. **WRIT SUSTAINED; AFFIRMED ON DIRECT APPEAL.**

Tiffany Koenig of Kragnes, Tingle & Koenig, P.C., Des Moines, for appellant.

R. Scott Rinehart, Sioux City, for appellee.

Heard by Mahan, P.J., and Eisenhauer and Baker, JJ.

EISENHAUER, J.

Melissa Huls appeals from the district court order (1) denying her petition to modify the visitation provisions of the decree dissolving the parties' marriage and (2) finding her in contempt for denying Paul Huls visitation with the parties' minor children. We affirm.

I. Background Facts and Proceedings. Paul and Melissa Huls were married on May 20, 1995. They have two children; Brekka, born in 1997, and Briley, born in 1999. A decree dissolving the marriage was entered on July 8, 2005. The decree incorporated the provisions of a stipulation between the parties, agreeing Melissa would have physical care of the children with Paul receiving "liberal" visitation. In the event the parties were unable to agree on a visitation schedule, the decree provided Paul would have visitation one evening per week and alternating weekends.

On about July 17, 2005, Melissa learned Paul was in a relationship and living with Mary Kozak, a woman Paul had dated prior to marrying Melissa and with whom Paul had engaged in an extra-marital affair. Paul and Mary were married on December 25, 2005.

Mary has been convicted of assault with intent to commit sexual abuse with injury as a result of a relationship she had with a female student at a school where she worked as a counselor. Mary received a suspended sentence and was placed on three years probation. Mary was also required to submit to a sex-offender evaluation and register as a sex offender for ten years, a period ending in January 2006.

Melissa knew of Mary's conviction and that she was a registered sex offender. Upon learning of Paul and Mary's relationship, Melissa refused to allow Paul overnight visitation with the children as agreed to by the parties and memorialized in the dissolution decree entered just nine days earlier. On October 11, 2005, Melissa filed a petition to modify the visitation provisions of the decree, citing the following reasons: (1) Paul was living with a registered sex offender whom he intended to marry; (2) Paul smokes and would take the children to visit his parents, who also smoke; (3) Paul allowed his parents to refer to her "in various obscene manners"; (4) Paul refused to talk to her to set up visitation; and (5) Paul would drop the children off with his parents during his scheduled visitation. Melissa contemporaneously filed a petition to find Paul in contempt for failing to pay child support or maintain health insurance for the children. On January 23, 2006, Paul filed an application for order to show cause for contempt, alleging Melissa was in contempt of court for failing to adhere to the visitation provisions set forth in the dissolution decree.

A hearing was held in March 2006 to address Melissa's petition to modify and both parties' contempt allegations. On June 1, 2006, the district court filed its ruling on these matters. The court denied Melissa's petition to modify, ordering the visitation provisions of the decree be enforced "without exception." The court also found both parties in contempt of court. Paul was sentenced to fifteen days in jail, but the court provided that the contempt could be expunged when Paul became current on his child support. Melissa was sentenced to thirty days in jail, with all thirty days suspended on the condition she follows the

visitation schedule in the future. On June 9, 2006, Melissa filed a motion for enlargement, which the court denied.

On appeal, Melissa contends the court erred in finding her in contempt of court and in failing to modify the visitation provisions of the dissolution decree to require supervised visits.

II. Motion for Leave to Amend. On June 4, 2007, Melissa filed a motion for leave to amend her final brief because an amended proof brief was accidentally filed in lieu of the final brief. Paul has no objection. Accordingly, we grant Melissa's motion.

II. Contempt. Because no appeal exists for punishment for contempt, we treat this portion of Melissa's appeal as an application for writ of certiorari. See *Rausch v. Rausch*, 314 N.W.2d 172, 173 (Iowa Ct. App. 1981). Our review on certiorari is limited to determining whether the district court acted illegally or without jurisdiction. *Zimmermann v. Iowa Dist. Ct.*, 480 N.W.2d 70, 74 (Iowa 1992). Review is not de novo but at law. *Id.*

A person can be held in contempt if a person "willfully disobeys the order or decree." Iowa Code § 598.23(1) (2005). No person may be punished for contempt unless the allegedly contumacious actions have been established by proof beyond a reasonable doubt. *In re Marriage of Wegner*, 461 N.W.2d 351, 353 (Iowa Ct. App. 1990).

[A] finding of willful disobedience requires evidence of conduct that is intentional and deliberate with a bad or evil purpose, or wanton and in disregard of the rights of others, contrary to a known duty, or unauthorized, coupled with an unconcern whether the contemner had the right or not.

Id. (quoting *Amro v. Iowa Dist. Court*, 429 N.W.2d 135, 140 (Iowa 1988)).

Paul has the burden of proving Melissa (1) had a duty to obey the court order, and (2) willfully failed to perform that duty. See *Christensen v. Iowa Dist. Court*, 578 N.W.2d 675, 678 (Iowa 1998). The burden then shifts to Melissa to produce evidence that the violation was not willful. See *id.* However, the burden to prove willfulness beyond a reasonable doubt always rests with Paul. See *id.* Melissa may show that her failure to comply with the order was not willful if the order was indefinite or if she was unable to perform the act ordered. *Christensen*, 578 N.W.2d at 678.

The district court did not apply the reasonable-doubt standard, but rather found clear and convincing evidence to support Paul's contempt action against Melissa. In applying the wrong standard, the court has acted illegally. *Christensen*, 578 N.W.2d at 678 ("Illegality exists when the court's factual findings lack substantial evidentiary support, or when the court has not properly applied the law.") Accordingly, the writ is sustained.

III. Modification. Melissa next contends the district court erred in denying her petition to modify the visitation provisions of the dissolution decree. She argues supervised visitations should be required to protect the children.

We review Melissa's claim de novo. See Iowa R. App. P. 6.4. We have a duty to examine the entire record and adjudicate anew the issues properly presented. *In re Marriage of Erickson*, 553 N.W.2d 905, 907 (Iowa Ct. App. 1996). We give weight to the trial court's findings of fact, particularly when considering the credibility of witnesses, but we are not bound by them. Iowa R. App. P. 6.14(6)(g).

To justify a change in visitation, a party must show there has been a change of circumstances not contemplated by the trial court at the time the decree was entered. See *In re Marriage of Rykhoek*, 525 N.W.2d 1, 3 (Iowa Ct. App. 1994). The burden to change a visitation provision in a dissolution decree is substantially less than to modify custody. *In re Marriage of Wersinger*, 577 N.W.2d 866, 868 (Iowa Ct. App. 1998).

In establishing visitation rights, our governing consideration is the best interest of the children. *In re Marriage of Stepp*, 485 N.W.2d 846, 849 (Iowa Ct. App. 1992). Generally, liberal visitation is in a child's best interest as it maximizes physical and emotional contact with both parents. See Iowa Code § 598.41(1)(a).

Assuming without deciding that Paul's relationship with Mary and subsequent remarriage was a change of circumstances not contemplated by the trial court at the time the decree was entered, we cannot conclude it is in the children's best interest that visitation be modified to supervised visitation. The schedule agreed to by the parties and set forth by the decree allows maximum contact with both parents and is in the children's best interest.

Melissa argues visitation should be supervised because the children need to be protected from Mary.¹

Our de novo review confirms the following findings by the trial court:

Melissa disdains everything about Mary and in all likelihood did prior to the time that Mary was involved in the current situation. The Court does not believe that that situation has much, if anything, to do with her earlier sexual indiscretion with a child beneath the age of consent and her criminal prosecution as a result. The Court

¹ On appeal, Melissa abandons the other four grounds she urged to the district court for modification. Accordingly, we need not address these grounds.

rather finds that the sexual abuse registry is a convenient way to make Mary (and Paul through Mary) a whipping post in this matter. The court has found not a scintilla of evidence that Mary has or ever would harm either of these two children in any way. The Court further finds that if the children have been harmed by the sexual abuse situation at all it has been by the overreaction of their mother and by the fact that their mother has created an irrational fear in them of Mary. The Court notes that at no time during her probation or her criminal prosecution was Mary restricted in any way from being around children. The Court notes that she successfully completed her probation and has successfully completed ten years on the sexual abuse registry without incident.

Because modifying visitation is not in the children's best interest, we affirm the district court's denial of Melissa's petition.

IV. Attorney Fees. Paul requests an award of his appellate attorney fees. An award of attorney fees on appeal is not a matter of right, but rests within the discretion of the court. *In re Marriage of Gonzalez*, 561 N.W.2d 94, 99 (Iowa Ct. App. 1997). We are to consider the needs of the party making the request, the ability of the other party to pay, and whether the party making the request was obligated to defend the district court's decision on appeal. See *In re Marriage of Maher*, 596 N.W.2d 561, 568 (Iowa 1999). We award Paul \$1,000 in attorney fees on appeal.

V. Conclusion. The district court's denial of Melissa's motion to modify is affirmed. We remand to the district court to apply the reasonable-doubt standard to Paul's contempt action against Melissa.

WRIT SUSTAINED; AFFIRMED ON DIRECT APPEAL.